COLD STORAGE CREAMERIES LTD. v. CHANG JOO CHIANG

[C. A. (Thomson C.J., Hill J.A. and Rigby J.) November 9, 1950]

[J. B. — F.M. Civil Appeal No. 56 of 1960]

Landlord and Tenant — Rent Control — Premium — Paid to third party — Grant of tenancy conditional on payment of $10,000 — Control of Rent Ordinance, 1956, s.4 — "Amount of such premium, etc." — Interpretation.

The appellant, in order to obtain a monthly tenancy from the respondent had to pay the latter a sum of $10,000. There was no written tenancy agreement and the company went into occupation of the premises on payment of the first instalment of the rent. When it came to the knowledge of the appellant company that the premises were due to be demolished, they brought an action for the recovery of the sum of $10,000 as an unlawful premium. The respondent had paid $9,000 to third parties. The learned trial Judge held that the payment was not made a condition of the grant of the tenancy but as a payment to the outgoing tenant as compensation for getting out. On appeal,

Held: (1) the respondent was requiring the payment of a 'premium' within the meaning of section 4 of the Control of Rent Ordinance, 1956;

(2) it was immaterial whether the money was paid to the respondent or to a third party;

(3) the words "the amount of the consideration shall be recoverable" in section 4(2) mean the cash value of the consideration.

Cases referred to:—

(1) *Rex* v. *Birmingham (West) Rent Tribunal* [1951] 2 K.B. 528.

(2) *Elmdene Estates Ltd.* v. *White* [1960] A.C. 528; [1960] 2 W.L.R. 359.

(3) *Remmington* v. *Larchin* [1921] 3 K.B. 404.

COURT OF APPEAL.

J. E. Lloyd for the appellant.

C. S. Wu for the respondent.

Thomson C.J. (delivering oral judgment): This is an appeal from a decision of Mr. Justice Neal. I do not think there is any serious controversy as to the facts of the case.

The appellant is a limited liability company in liquidation. The respondent is some sort of a business-man operating in Johore Bahru.

Some time in the latter part of 1958 the appellant Company were minded to secure business premises in the town of Johore Bahru and with that end in view they instructed their agents in Singapore, Messrs. Nassim & Co. Messrs. Nassim & Co. got in touch with the respondent who among other things manages a certain amount of shophouse property in Johore Bahru which was the property of His late Highness the Sultan of Johore. The defendant himself described his functions in connection with this property as collecting the rents and obtaining tenants but said that he did not have unlimited authority to grant tenancies. It is clear, however, that what happened in practice was that whenever a vacancy arose in a shophouse he obtained a prospective tenant and made arrangements with him and submitted his name to the landlord for approval. And it is clear from the evidence of the landlord's private secretary that in the case of a respectable prospective incoming tenant of good financial standing the obtaining of approval was very much a formality. Subject to that restriction, for what it was worth, the respondent was the landlord's agent for the purpose of managing, letting and collecting rents on the property.

As a result of a preliminary conversation between Messrs. Nassim & Co.'s representatives and the respondent, an agreement was made whereby the appellant was to become the monthly tenant of a shophouse at No. 43, Jalan Tan Hiok Nee, which is just round the corner from where we are sitting now. And in the course of these negotiations the respondent made it clear that if they were to get the tenancy they desired, the appellant company would have to pay the sum of $10,000. He said, and there is some evidence to support this story, that none of that money was to go to him, that $9,000 of it was to be paid to the existing tenant of No. 43 who, rather curiously, was his own sister and who though she had only been in occupation of the premises for a little more than a year had in that time spent some $9,000 in repairs and effecting improvements.

Be the truth as it may, that was the respondent's story and for the purpose of these proceedings I do not think it is open to this Court at this stage to reject that story which was accepted by the learned trial Judge.

In the event the Company paid the money and went into occupation of the premises.

Now, it is admitted (it is of some importance to observe just what happened at the actual giving of the tenancy) that there was no written tenancy agreement. The respondent as the landlord's agent handed the Company's representative the key of the premises and gave him a receipt for the first instalment of the rent and the Company went into occupation.

Unfortunately at the time of the letting (I express no views as to who knew how much and when) the premises were due to be demolished and I have no doubt it is because that fact came to their knowledge that the appellant company or at least the liquidators started looking into what they considered to be their legal rights.

Be that as it may, the company came to Court and said the respondent's taking of $10,000 was unlawful by reason of section 4 of the Control of Rent Ordinance, 1956, and that moreover by reason of that section they were entitled to recover from the person to whom it was paid, which is the respondent. The learned trial Judge dismissed their claim and it is against that decision that they have now appealed.

The case turns entirely on the construction of the following words of section 4 of the Control of Rent Ordinance:—

"No person shall, as a condition of the grant, renewal, continuance, sale or assignment of a tenancy of any premises or as a condition for sub-leasing or subletting any premises, require the payment of any premium or other like sum or the giving of any valuable

consideration in addition to the rent, or receive such payment or consideration".

The first observation I would make here is this. That section differs in its terms from the corresponding section of the English Rent Act of 1949, which is section 2. It is to be observed, however, that our Ordinance was enacted in 1956 and at that time the law was thought to be as laid down by a Divisional Court in the case of *Rex* v. *Birmingham (West) Rent Tribunal*[1] where it was held that all that was struck out by section 2 of the English Act of 1949 was a payment direct to the landlord. That case, of course, was distinguished in the case of *Elmdene Estates Ltd.* v. *White*[2] some nine years later, but that was what was thought to be the proper interpretation of section 2 of the English Rent Act at the time our Ordinance was enacted in 1956 and that view of the law may have been the reason why our section is phrased in very much wider terms than the corresponding English section.

The first thing that must be made out to bring a case within the section is that the payment must be made as a condition of the grant of a tenancy. The learned trial Judge has said it was not made a condition of the grant of a tenancy and that it was really made as a payment to the outgoing tenant as compensation for getting out, and we have been told that that is a finding of fact. I am not going to read at length what was said in the *Birmingham* case but if it is a finding of fact it is just the type of finding of fact that this Court is entitled to interfere with because it is very much an inference from primary facts.

My own view is that with great respect to the argument to which we have listened we have got to look at the transaction from the point of view of the incoming tenant. He was told in effect, and this is beyond any controversy whatsoever, "if you want this tenancy you must hand over to me the sum of $10,000". And how else to describe that than a condition for granting the tenancy I fail to see. It is true that the respondent had to get the prior approval of the Sultan but it is equally clear that that was unlikely to present very much difficulty and it did not in fact present very much difficulty. And even if the Sultan's approval was necessary for the granting of the tenancy it was the act of the respondent as the landlord's agent in making a payment of $10,000 a condition.

That brings me to the second point that it is really immaterial whether the money was paid to the respondent for his own pocket or, as we must accept it on the evidence, partly for payment to the outgoing tenant and partly to pay a secret commission to Messrs. Nassim & Co. I think there is ample authority for that proposition in the *Elmdene Estates* case.

The object of all this legislation about rent control is not to penalise or impoverish landlords; the object is to protect tenants. As it was put by Lord Radcliffe thus (at p. 54):—

> "The words of the section do not require that the prohibited payments should be only those made to landlords themselves. So far as the tenant is concerned, the cost of accommodation is raised against him just as much if he hands his money over to someone else as it is if he hands it directly to the landlord".

In the present case I think it is entirely beside the point to consider whether the respondent kept the money in his own pocket or whether he passed it on to his sister and Messrs. Nassim & Co.

To my mind that is sufficient to dispose of the case. There are, however, two points I must deal with before departing from it.

In the first place there is the very persuasive argument that has been addressed to us by Mr. Wu based on the case of *Remmington* v. *Larchin*[3]. In that case, however, the deal was a direct one between an outgoing tenant and an ingoing tenant. The landlord did not enter into the picture at all. He was in complete ignorance of what happened between the two tenants. That is entirely different from a case where, as here, the leading part is taken by the landlord's agent who is, to use the phrase of Lord Jenkins in *Elmdene Estates* case, "the master of the situation".

The other point I must deal with is the finding of the trial Judge based on sub-section (2) of section 4 which reads as follows:—

> "Where under an agreement made since the coming into force of this Ordinance, any premium or other like sum or valuable consideration has been paid, which, or the whole of which, could not lawfully be required under the provisions of this section, the amount of such premium, sum or consideration, or so much thereof as could not lawfully be required, shall be recoverable by the person by whom it has been paid".

Now the learned trial Judge points out quite correctly that the section does not say in terms from whom the money can be recovered, and his argument seems to be this. Then the section talks about "any premium or other like sum or valuable consideration" and he says that "consideration might be something other than money", giving the two examples of a diamond wrist watch and two buffaloes. Then the argument seems to be it is the jewellery or the buffaloes that may be recoverable and that means proceedings can only be taken against the person who actually has the buffaloes or the jewellery. That argument overlooks the wording of the section. It does not say "the consideration shall be recoverable." What it does say is that the amount of the consideration shall be recoverable and amount of the consideration is capable of one meaning and one meaning only and that is the cash value of the consideration.

In all the circumstances of the case and basing myself on the *Elmdene Estates* case I would allow the appeal with costs.

Hill J. A. concurred.

Rigby J. (delivering oral judgment): I agree with all that the learned President has said.

For myself I would be content to base my decision on the answers to a number of questions postulated by Mr. Lloyd for the appellants in the

course of his able argument. First, were the appellants granted the tenancy? Secondly, was a payment of a premium required as a condition of the grant of that tenancy? Thirdly, was the premium paid as a result of an agreement entered into between the appellants and the respondent that it should be so paid as a premium required as a condition of the tenancy? Fourthly, was it so required and received by the respondent? The answers to each and every one of those questions is in the affirmative.

It was said that the respondent was simply employed by His Highness the Sultan as a rent collector and that it was His Highness, and His Highness alone, who had power to grant tenancies. That, of course, is perfectly true, but the fact remains that the respondent at all material times in this case held himself out to the appellants as the agent acting on behalf of the Sultan and that he was in a position to obtain a grant of these premises on payment of a premium.

According to the evidence of the principal witnesses for the appellants the respondent said that he knew of a place in Jalan Tan Hiok Nee and that compensation was required to be paid. He added that it was the Sultan's property and that he was acting as agent for the Sultan. It is abundantly clear upon the evidence that he held himself out as empowered, subject to the formal permission of His Highness the Sultan, to make such a grant, that the compensation or premium was paid on the strength of that holding out and that the holding out was in fact subsequently ratified in that a grant was approved of the premises to the appellants. It seems to me immaterial as to whether the landlord himself received the premium or whether the respondent, purporting to act as agent, received it and put it in his pocket. The crucial question, was in my view: was a premium required and received as a condition for the grant of the premises to the appellants? And the answer to that question was clearly in the affirmative. As Viscount Simonds said in the course of his opinion in *Elmdene Estates Ltd.* v. *White*[2]:—

> "My Lords, it has been said before, and it must be said again, that in the consideration of questions arising under the Rent Acts the court must look at the substance and reality of a transaction, not its form:"

It seems to me abundantly clear upon the evidence that the respondent demanded and received an unlawful consideration from the appellants and that that consideration or premium is clearly recoverable under the provisions of section 4(2) of the Control of Rent Ordinance.

I too would allow this appeal with costs.

Appeal allowed.

Solicitors: *Drew & Napier; Donaldson & Burkinshaw.*

PUBLIC PROSECUTOR v. TAN KOOI CHOO

[C. A. (Thomson C.J., Hill J.A., Hepworth J.) November 24, 1960]

[Penang — F.M. Criminal Reference No. 4 of 1960]

Criminal Law — Penal Code, s.381 — Theft — Inference from facts.

This was a reference to the Court of Appeal under section 34(1) of the Courts Ordinance, 1948, as to whether theft was committed in the following circumstances: the appellant, an employee of the Penang Port Commission had been given two packets of tea within the Penang Port Commission Area by a servant of the consignee before they had been cleared. There was no evidence to show that the servant of the consignee did or did not have the permission of his employer, the consignee, to give away small quantities of damaged packets of tea.

Held: in the circumstances, it could not be necessarily inferred that theft was committed.

Semble: the fact that the Penang Port Commission suffered no loss does not mean that the respondent did not cause a wrongful gain to himself.

COURT OF APPEAL (REFERENCE).

Hamzah bin Dato Abu Samah (Deputy Public Prosecutor) for the appellant.

Lee Thean-Chu for the respondent.

Hepworth J.: In this case the respondent had been charged in the Sessions Court, Penang, as follows:—

> "You are charged that you on the 17th day of June, 1960 at about 11.00 a.m. at the Penang Port Commission premises, Penang, being employed in the capacity of a servant of the Penang Port Commission committed theft by stealing certain property, to wit, 2 packets of tea and loose leaves amounting to the value of $2 in the possession of the said Penang Port Commission and that you have thereby committed an offence punishable under section 381 of the Penal Code".

In the event the prosecution case was confined to the 2 packets of tea only.

At the end of the trial the learned President found the respondent not guilty and acquitted him. From this decision the Public Prosecutor appealed.

On the hearing of the appeal by Rigby J., in the High Court, Penang, the learned Judge allowed the appeal, convicted the respondent of theft as charged, and sentenced him to one month's imprisonment.

The basis of the learned Judge's decision was that the evidence appeared to him to be irresistible that the respondent knew perfectly well that he was not entitled to accept the tea at the time and in the circumstances disclosed by the evidence, and that in doing so he intended to take dishonestly the tea out of the possession of his employers, the Penang Port Commission.

However the learned Judge felt that it was of considerable public importance that it should be decided by the Court of Appeal whether the inference he had drawn from the evidence was a necessary inference. Accordingly the learned Judge referred the question to the Court of Appeal under section 34(1) of the Courts Ordinance, 1948. The terms of the reference were as follows:—